Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TONYJA DUFFIELD,
Petitioner,

v.

ROBERTSON, STEPHENS & COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the federal government's involvement in the securities industry's mandatory employment arbitration system, by virtue of the Securities Exchange Act and the SEC's oversight role, sufficient to trigger constitutional scrutiny of that system?

2. Was the Ninth Circuit correct in refusing to address the merits of plaintiff's unconstitutional conditions challenge solely because she was hired in 1988, before the SEC promulgated a regulation requiring all securities traders to be registered with a national exchange, even though plaintiff continued to be employed after that date and despite the extensive government involvement in the securities industry arbitration scheme throughout the period of her employment?

3. Did mandatory securities industry arbitration impose an unconstitutional condition upon plaintiff's employment?

PARTIES

All parties appear in the caption of the case on the cover page.

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Tonyja Duffield—plaintiff/appellant below—cross-petitions for a writ of certiorari, conditioned upon this Court granting the petition for writ of certiorari in *Robertson Stephens & Company v. Duffield*, No. 98-237. In that petition, Ms. Duffield's former employer seeks review of the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182 (9th Cir. 1998), insofar as it holds that Title VII prohibits an employer from unilaterally imposing, as a non-negotiable condition of employment, an agreement compelling its workers to submit Title VII and state civil rights claims to binding securities industry arbitration, thus precluding them from prosecuting their statutory discrimination claims in federal or state court.

Robertson Stephens' petition should be denied for the reasons stated in Ms. Duffield's Brief in Opposition. However, if the petition in No. 98-237 is granted, this Court should also grant Ms. Duffield's cross-petition to enable it to consider a closely related issue, also decided by the Ninth Circuit in this case, which if resolved in Ms. Duffield's favor would preclude compelled arbitration of *all* of her employment claims against Robertson Stephens, not just her statutory discrimination claims.

OPINIONS BELOW

The opinion of the court of appeals is reported at 144 F.3d 1182 and is reprinted in the Appendix to Robertson Stephens' Petition for Certiorari in No. 98-237 ("Pet. App.") at Pet. App. 1a-56a. The district court's opinion of August 26, 1996, denying Ms. Duffield's motion for partial summary judgment, is not reported and appears at Pet. App. 57a-71a. The district court's opinion of March 13, 1997, granting Robertson Stephens' motion to compel arbitration and certifying all arbitration issues in the case for interlocutory appeal, is not reported and appears at Pet. App. 72a-87a. The court of appeals' order of April 21, 1997, granting plaintiff permission to appeal the August 26, 1996 and March 13, 1997 orders pursuant to 28 U.S.C. § 1292(b), is not reported and appears at Pet. App. 88a.

JURISDICTION

The court of appeals' opinion was filed on May 8, 1998. On August 5, 1998, the petition for writ of certiorari in No. 98-237 was docketed. This conditional cross-petition for writ of certiorari is timely filed under Supreme Court Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Ms. Duffield first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331, 1343, and 1367.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent text of the provisions involved is set forth in the appendix to this cross-petition.

STATEMENT OF THE CASE

1. ***Facts.***

Tonyja Duffield was employed by Robertson Stephens as a securities trader from June 1988 until April 1994. Pet. App. 59a. Like every individual who worked as a securities trader or broker in the United States during that period, Ms. Duffield was required as a condition of her employment to sign a securities industry Form U-4 and to register (and remained registered) with each national securities exchange of which her employer was a member—in Ms. Duffield's case, the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"). Pet. App. 9a-10a.[1]

Throughout Ms. Duffield's employment, the NYSE and NASD rules required all registered representatives to arbitrate all employment disputes, at their employer's option, under the exchanges' arbitration rules and procedures. Pet. App. 10a-11a. The Form U-4, which Ms. Duffield was compelled by law to sign as a condition of her employment, required her to abide by rules and regulations of the exchanges with which she registered. Pet. App. 10a. The Securities Exchange Act, 15 U.S.C. § 78s(g)(1)(A), further required the exchanges to enforce compliance with their rules.

Ms. Duffield had no choice about whether to sign the Form U-4 or the mandatory arbitration clause contained

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[1] NASD is technically "a securities association registered pursuant to [the Exchange Act]" (15 U.S.C. § 78o(b)(8))—the only such entity—rather than a national exchange. For simplicity, we refer to NASD as if it were a national exchange, as there is no pertinent difference as to the matters addressed here.

therein. Had she refused, she could not lawfully have been employed as a trader for any U.S. securities industry employer. Pet. App. 9a.

2. ***Mandatory Securities Industry Arbitration.***

The federal scheme that compelled Ms. Duffield to accept mandatory securities industry arbitration as a non-negotiable condition of her employment as a securities trader consists of three interlocking components.

First, the Exchange Act makes it illegal for broker-dealers to trade securities unless they are members of a national securities exchange (15 U.S.C. § 78o(b)(8)), and authorizes the exchanges to adopt rules requiring any person associated with an exchange member to be registered with the exchange. 15 U.S.C. § 78f(c)(3)(B), § 78o-3(g)(3)(B). In addition, the Exchange Act since 1975 has specifically *required* each exchange to comply with its own rules and to enforce compliance with those rules "by its members and persons associated with its members," including securities traders such as Ms. Duffield. 15 U.S.C. § 78s(g)(1)(A).

Second, the Exchange Act prohibits an exchange from coming into existence without SEC approval (15 U.S.C. § 78f, § 78o-3), and requires the exchanges to submit to the SEC all proposed rules and rule changes, including amendments to their employment arbitration rules. The SEC, in turn, is required to review and analyze those proposed rules, and to accept or reject them. The SEC may also abrogate, add to, and delete from existing exchange rules on its own initiative. *See* 15 U.S.C. § 78s (b)(1) ("No proposed rule change shall take effect unless approved by the Commission . . . ."), § 78s(b)(2), § 78s(c) (SEC may "abrogate, add to, and delete from [rules] as the Commission deems necessary or appropriate"). Thus, the rules of the exchanges can only exist as long as the SEC does not eliminate or amend them; those rules cannot be repealed or amended without SEC ap-

proval; and those rules must be enforced by the exchanges, unless the SEC explicitly permits otherwise.

The SEC has regularly exercised its statutory oversight function with respect to the exchanges' employment arbitration rules.[2] Moreover, during the past 25 years the SEC has been the initial source of many of the exchanges' employment arbitration rules, just as it was the initial source for the Form U-4 (which contains the mandatory arbitration clause) that Ms. Duffield signed in 1988.[3] In

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[2] *See, e.g.*, SEC Release No. 34-32802, 1993 SEC LEXIS 2151, 58 Fed. Reg. 45932 (August 25, 1993) (approving amendments to NASD Code of Arbitration Procedure clarifying that the mandatory arbitration provisions apply to "employment-related" disputes and that for "employment discrimination claims the panel must consist of a majority of public arbitrators"; amendments will "ensure that the arbitration of industry employment disputes may be compelled at the instance of one of the parties to the dispute"); SEC Release No. 34-35314, 1995 SEC LEXIS, 60 Fed. Reg. 7241 (February 1, 1995) (approving NASD arbitration rule changes governing "certain large and complex" cases, including employment discrimination cases, to establish fee schedules, to require that at least one arbitrator be an attorney; rejecting comments objecting to mandatory arbitration of employment disputes and to limited discovery rights); SEC Release No. 34-26805, 1989 SEC LEXIS 843 (May 10, 1989) (approving detailed changes to arbitration procedures, including fee, discovery, and panel selection matters, and rejecting public comments requesting, *inter alia*, that arbitrators be required to state the reasons for their decisions).

[3] *See, e.g.*, SEC Release No. 34-17383, 1980 LEXIS 100 (Dec. 17, 1980) (Form U-4); SEC Release No. 34-11424, 1975 LEXIS 1592 (May 16, 1975) (same); SEC Release No. 34-26805, 1989 SEC LEXIS 843 (May 10, 1989) at 4 (during the past two decades, "[t]he majority of the proposals to amend the [exchanges' arbitration] rules were . . . in response to the . . . Commission letters"); *id.* at 3-5, 7, 16, 22, 31, 32, 44 n.51, 51 n.59 (describing the SEC's ongoing series of letters to the exchanges, communicated through Securities Industry Conference on Arbitration, that presented the SEC's views on the exchanges' arbitration procedures, "requested [that the exchanges] amend their rules" to conform to the SEC's views, and resulted in a series of proposed rule changes that were "develop[ed] in response to the Commission's letters").

addition, the SEC's staff has long engaged in comprehensive discussions with the exchanges about their securities arbitration rules and procedures, and has systematically reviewed those procedures and the exchanges' arbitration case files pursuant to the SEC's responsibilities under the Exchange Act.[4]

Third, beginning in 1993, the SEC by regulation (17 C.F.R. § 240.15b7-1) explicitly required all traders to be registered with a national securities exchange. However, although that regulation conferred additional enforcement powers upon the SEC, it did not impose new registration requirements on securities traders, like Ms. Duffield, who were already trading on exchanges that required registration (such as the NASD and NYSE). *See* 58 Fed. Reg. 27656, 27657 (May 11, 1993). Those exchanges already had mandatory registration rules, and federal law already required the exchanges to enforce those rules and not to eliminate or amend them without SEC approval.

3. ***District Court Proceedings.***

Ms. Duffield filed her Complaint against Robertson Stephens on January 11, 1995. Pet. App. 59a. She alleged that Robertson Stephens subjected her to sexual discrimination, sexual harassment and retaliation in violation of Title VII of the 1964 Civil Rights Act and California's Fair Employment and Housing Act ("FEHA"). She further alleged that Robertson Stephens had engaged in common law breaches of contract, fraud, deceit, and intentional and negligent infliction of emotional distress. Pet. App. 12a.

Preliminarily, Ms. Duffield's Complaint sought a declaratory judgment that she could not be forced to arbitrate her disputes under the mandatory Form U-4 arbitration

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[4] *See* Buck Depo. at 23, 155 & Ex. 45 (included in Appellant's Excerpts of Record in the court of appeals, Tab F); GAO Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) at 3.

clause. Pet. 12a. She presented five interrelated challenges to the enforceability of mandatory securities industry arbitration in support of that claim (*See* Pet. App. 12a), none of which had been addressed or decided in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Among them was her claim that securities industry arbitration is a governmentally-mandated condition of employment that unconstitutionally deprives securities industry employees of their rights under Article III, the Fifth Amendment, and the Seventh Amendment. Pet. App. 12a, 48a-49a.

In the district court, the parties conducted extensive discovery into the workings of the securities industry's arbitration system and the extent of the SEC's involvement and oversight. Following discovery, Ms. Duffield moved for summary judgment on her declaratory judgment claim. The district court denied her motion and subsequently granted Robertson Stephens' motion to compel arbitration, rejecting each of Ms. Duffield's challenges to mandatory securities industry arbitration. Pet. App. 57a, 72a. However, the district court certified its orders for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed its order compelling arbitration pending an appellate decision. Pet. App. 87a.

4. ***Court of Appeals Decision.***

The Ninth Circuit granted interlocutory review under 28 U.S.C. § 1292(b). Pet. App. 88a. After briefing and argument, the panel reversed the district court in part, affirmed in part, and remanded the case for further proceedings. Pet. App. 56a.

The court of appeals agreed with Ms. Duffield (and the Equal Employment Opportunity Commission as *amicus*) that Congress, in enacting the Civil Rights Act of 1991, intended to preclude compulsory pre-dispute arbitration agreements, unilaterally imposed as a non-negotiable condition of employment, that force workers to

arbitrate Title VII and state FEHA claims rather than to litigate such claims in federal or state court. The court of appeals therefore reversed the district court's order insofar as it compelled arbitration of Ms. Duffield's *statutory discrimination* claims. Robertson Stephens' petition for writ of certiorari in No. 98-237 concerns that aspect of the court of appeals' ruling.

Having ruled that plaintiff could proceed in federal court on her statutory discrimination claims, the Ninth Circuit found it unnecessary to consider all but one of Ms. Duffield's remaining challenges, which presented alternative grounds for reaching the same result. Pet. App. 22a n.7. The court was required to address Ms. Duffield's unconstitutional conditions argument because, if accepted, that argument would have entitled Ms. Duffield to litigate not only her statutory claims but her state common law contract and tort claims as well.

The court of appeals acknowledged that securities industry arbitration *is* governmentally compelled for every securities trader who signed a Form U-4 after May 1993 —the effective date of the SEC regulation requiring all traders to be registered with a national securities exchange (and thereby to be bound by the exchange's mandatory arbitration rules). Adopting the analysis of the D.C. and Seventh Circuits, the court characterized this registration requirement as " 'constitut[ing] government action of the purest sort.' " Pet. App. 51a, *quoting Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied* 517 U.S. 1119 (1996). Nonetheless, the court refused to reach the merits of Ms. Duffield's unconstitutional conditions argument, concluding that the SEC's promulgation of 17 C.F.R. § 240.15b7-1 in 1993 did not affect securities traders like Ms. Duffield who were hired *before* 1993. The court thus rejected plaintiffs' argument that the SEC regulation constituted a federally-mandated condition upon her *continued* employment after 1993, because that regulation required her to *remain* registered with the NASD and NYSE and thus bound by their rules. The

court also rejected plaintiff's additional argument that "state action" existed before 1993 in any event, both because 15 U.S.C. § 78s(g)(1)(A) *already* required the exchanges to enforce their SEC-approved rules against all members and persons associated with those members, and because the SEC was actively involved in formulating the content and scope of the exchanges' mandatory arbitration rules and procedures long before 1988.

REASONS FOR GRANTING THE WRIT

Robertson Stephens has petitioned this Court for a writ of certiorari to review the Ninth Circuit's holding that Ms. Duffield may litigate her statutory discrimination claims in court. Ms. Duffield opposes that petition for the reasons stated in her Brief in Opposition. If this Court grants Robertson Stephens' petition, however, it should also grant this cross-petition. Only by granting both petitions can this Court fully resolve the interrelated challenges to mandatory securities industry arbitration raised in this and other cases, including the challenge to unilaterally-imposed mandatory arbitration of state common law claims.[5]

Robertson Stephens argues that the need for certainty requires this Court to resolve the legality of mandatory

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[5] As the prevailing party on the Question Presented in Robertson Stephens' petition, Ms. Duffield is entitled, without filing a cross-petition, to defend the judgment on any ground properly raised below, "provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Ms. Duffield may therefore defend on the basis of any of her arguments, including her unconstitutional conditions argument (to the extent it encompasses her right to pursue statutory discriminatory claims in court). However, because a favorable ruling on that argument would also entitle her to pursue in court her state common law claims, this Court must grant her cross-petition to be in a position to resolve the entire case.

arbitration in the context of this case (*see* Petition at 28-29), even though other circuit courts have just begun to address similar challenges and notwithstanding recent fundamental changes to the mandatory securities industry arbitration system.[6]

Although Ms. Duffield disagrees with Robertson Stephens' argument for the reasons stated in the Brief in Opposition, if the Court concludes that certiorari should be granted to resolve the pending challenges, this cross-petition should be granted as well. Otherwise, the "unconstitutional conditions" challenge to mandatory arbitration in the securities industry—and specifically, its application to state common law claims—will remain unresolved, regardless of how the Court answers the Question Presented by Robertson Stephens.[7] Moreover, as we ex-

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[6] As explained in the Brief in Opposition, the SEC on June 22, 1998 approved sweeping amendments to the NASD's arbitration rules, exempting all employment discrimination and sexual harassment claims from that exchange's mandatory securities industry arbitration requirement effective January 1, 1999. *See* SEC Order Granting Approval To Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SR-NASD-97-77, SEC Release No. 34-40109 (June 22, 1998). The SEC has recently called upon the NYSE and other exchanges to submit similar amendments to their mandatory arbitration rules for SEC approval; the NYSE is expected to vote in early September 1998 whether to follow the NASD's lead and abandon mandatory arbitration of statutory discrimination claims. *See* Rosalyn Retkwa, *Forced Arbitration Under Attack*, Registered Representative 79 (August 1998). If that occurs, Robertson Stephens' petition in No. 98-237 may be rendered moot, depending on how the new NYSE rules apply to pending lawsuits.

[7] Cases in which other plaintiffs are pressing the same "state action/unconstitutional conditions" challenge to mandatory securities industry arbitration are now pending before other circuits, and involve workers whose dates of hire are both before and after 1993. *See, e.g., Koveleskie v. SBC Capital Markets, Inc.* (7th Cir. No. 98-1793) (employee hired in 1992); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. No. 98-1426) (employee hired in 1994); *Desiderio v. NASD, Inc.* (2d Cir. No. 98-6100)

plain below, the Ninth Circuit's ruling that "state action" exists only as to securities industry employees hired after May 1993 is not only wrong, but is inconsistent with other circuit court decisions and with several of this Court's "state action" precedents.

1. In *Gilmer*, this Court rejected a *facial* challenge to the securities industry's arbitration scheme as applied to an employee's claim for violation of the Age Discrimination in Employment Act. The Court concluded, based on the "speculat[ive]" and "generalized" arguments presented, that securities industry arbitration constituted a simple change of "forum" with no corresponding deprivation of substantive rights, and that judicial review of arbitration awards would likely be sufficient to correct any problems. *Id.* at 27-28, 30-32.[8] However, the unconstitutional conditions issue was not presented in *Gilmer*. Nor has this Court ever considered that issue with respect to mandatory securities industry arbitration of employment claims.

a. The doctrine of unconstitutional conditions prohibits the government from conditioning a worker's employment upon a waiver of that worker's constitutional rights. This doctrine has long put to rest "Justice Holmes' famous dictum that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cty. Com'rs v. Umbehr*, 116 S.Ct.

(employee offered job in 1996; job offer withdrawn after she refused to sign Form U-4 mandatory arbitration clause).

Because the unconstitutional conditions argument, if accepted, would pretermit all other challenges to mandatory securities industry arbitration (because it encompasses all underlying merits claims), the Questions in this cross petition are logically considered prior to the Question Presented in Robertson Stephens' petition, which concerns statutory discrimination claims only.

[8] Ms. Duffield's Brief in Opposition summarizes the undisputed post-*Gilmer* evidence, developed through almost two years of discovery in this case, that in actual practice securities industry arbitration has not proven to be just another forum to vindicate statutory rights, but in fact leads to a deprivation of those rights.

2342, 2347 (1996), *quoting McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).[9] Ms. Duffield argued below that the federal government is ultimately responsible for the requirement of mandatory securities industry arbitration. She further argued that this requirement imposes a non-negotiable condition of employment that unconstitutionally deprives her of her right under Article III of the Constitution not to be forced by the federal government to adjudicate her employment claims in a non-Article III forum, her Seventh Amendment right to a jury trial, and her Fifth Amendment rights to due process and equal protection.

b. The "state action" inquiry ultimately turns on whether there is "a sufficiently close nexus between the State and the challenged action" such that "the alleged infringement of [constitutional] rights [is] fairly attributable to the State." *Lebron v. Natl. R.R. Passenger Corp.*, 513 U.S. 374, 408 (1995) (O'Connor, J., dissenting), *quoting from Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), *and Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). This Court has acknowledged that the "state action" doctrine has confused the lower courts and that it requires further development by this Court. "It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistentcy.'" *Lebron*, 513 U.S. at 378, *quoting Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

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[9] *See also Greene v. McElroy*, 360 U.S. 474 (1959) (independent contractors); *United States v. Robel*, 389 U.S. 258 (1967); *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Barron v. Burnside*, 121 U.S. 186 (1887) (state may not condition corporation's license to do business upon waiver of Article III right to sue in federal court); *Herndon v. Chicago, Rock Island & Pacific Railway Co.*, 218 U.S. 135 (1910) (same); *see generally* K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 3 (1997); J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83 (1996).

The court of appeals rejected Ms. Duffield's unconstitutional conditions argument after concluding that mandatory securities industry arbitration was not pursuant to state action when she was initially hired and signed her Form U-4 in 1988. Pet. App. 51a-55a. The court acknowledged, however, that if plaintiff had signed her Form U-4 *after* 1993, the exchanges' mandatory arbitration rules *would* constitute state action, because:

> [i]n 1993, . . . the Securities and Exchange Commission (SEC) adopted a regulation that required all broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member—i.e., the NASD and the NYSE—before effecting any securities transaction. *See* 17 C.F.R. § 240.15b7-1 (adopted May 11, 1993). That registration regulation, like the SEC's registration regulation at issue in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 1351 (1996), "operates not as a private compact among brokers and dealers but as federal law." *Id.* at 941. Hence, to borrow *Blount's* reasoning, as a government-mandated "condition to any participation in a . . . securities career," the current requirement that new employees register with a national securities exchange "constitutes government action of the purest sort." *Id.* [Pet. App. 51a.]

The court of appeals' distinction between employees hired before and after 1993 does not withstand scrutiny.

2a. The Ninth Circuit was correct that the promulgation of 17 C.F.R. § 240.15b7-1 in May 1993 is sufficient, standing alone, to trigger constitutional scrutiny of mandatory securities industry arbitration for traders hired after that date. The SEC's requirement that traders be registered with an exchange as a condition of trading securities placed the government's imprimatur—indeed, its mandate—upon the exchanges' rules (including their mandatory arbitration rules). Indeed, that is precisely

the conclusion, on similar facts, reached by the two other circuit courts to address the issue.

In *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), the D.C. Circuit considered a constitutional challenge to a rule, promulgated by the Municipal Securities Rulemaking Board ("MSRB") and approved by the SEC, that regulated political contributions by municipal securities broker-dealers. 61 F.3d at 939. Intervenor MSRB defended on the ground that it was a private organization whose rules were not subject to constitutional scrutiny. *Id.* at 941. The D.C. Circuit rejected this argument, concluding that even if the MSRB were a private organization, enforcement of its rules would constitute state action because, under federal law, all municipal securities broker-dealers, as a condition of employment in the industry, were required to register with the MSRB and to obey its SEC-approved rules. *Id.* Because of the registration requirement, those MSRB rules "operat[ed] not as a private compact among brokers and dealers but as federal law." *Id.*

Similarly, in *R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995), the Seventh Circuit found state action in the mandatory arbitration rules of the National Futures Association ("NFA"), a private organization with which commodities futures brokers were required to register as a condition of trading commodities futures. 64 F.3d at 259. Despite the private nature of the NFA, the Seventh Circuit found state action because federal law required the broker to register with the NFA, and thus to comply with its rules, including its mandatory arbitration rules. *Id.* at 262.

b. In limiting its state action finding to the *post*-1993 period, however, the Ninth Circuit ignored an even stronger argument supporting state action, because when Ms. Duffield was hired in 1988, the Securities Exchange Act *already* required Ms. Duffield to be registered with the NASD and NYSE and to comply with their mandatory arbitration rules as a condition of her lawful em-

ployment as a securities trader. Since 1975, 15 U.S.C. § 78s(g)(1)(A) has required national securities exchanges to enforce compliance with their (SEC-approved) rules "by [their] members and persons associated with their members," including securities traders such as Ms. Duffield. When Ms. Duffield signed her Form U-4 in 1988, NASD and NYSE rules required registration by securities traders. *See* NYSE Rule 345(a); NASD Manual ¶ 1785. More importantly, those rules also required mandatory arbitration under the exchanges' SEC-approved rules. Pet. App. 10a-11a. Thus, at the time plaintiff was hired, the mandate of federal law already bound her to comply with the NASD's and NYSE's arbitration rules, and she could not avoid those rules if she wished to pursue her chosen occupation as a securities trader. Contrary to the court of appeals' assumption, then, 17 C.F.R. § 240.15b7-1 added no *new* government mandate. Rather, 15 U.S.C. § 78a(g)(1)(A) had already deputized the exchanges to formulate and enforce compliance with rules to which securities traders like Ms. Duffield would be bound.

There is no difference, as either a practical or legal matter, between: 1) a federal regulation requiring registration with an exchange; and 2) a federal statute requiring exchanges to enforce their rules requiring registration and providing that those rules cannot be eliminated or modified without explicit SEC approval. In both instances, federal law requires securities industry employees to choose between: 1) registering with an exchange and thereby accepting mandatory arbitration; and 2) finding some other job outside of their chosen profession. In both instances, only the SEC has the legal authority to eliminate the mandatory registration and arbitration requirements, regardless of what the exchanges, employers, employees, or any other ostensibly "private" actors may prefer.[10] Thus, the court of appeals' distinction between

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[10] *Compare Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), which involved a private club with racially discriminatory by-laws. The club was licensed by a state liquor commission, which had a

the degree of federal compulsion pre- and post-1993 is meaningless, and its decision cannot be reconciled with *Blount*, *R.J. O'Brien*, or the precedents of this Court on which those decisions rely.

c. The Ninth Circuit's analysis is also inconsistent with the established line of cases holding that state action exists where the government "has provided such significant encouragement, either overt or covert, that the [private party's] choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see, e.g., Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 615-16 (1989) (allowing a constitutional challenge to a private railroad's drug-testing of employees pursuant to federal regulations that authorized but did not compel drug-testing, because federal regulation of discretionary procedures demonstrated that "the Government did more than adopt a passive position toward the underlying private conduct").[11] Here the federal government

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regulation requiring that "[e]very club licensee shall adhere to all of the provisions of its Constitution and Bylaws." *Id.* at 177. This Court found that the liquor commission's requirement that the club enforce its (discriminatory) bylaws was state action. *Id.* at 178-79. Ms. Duffield, of course, presents a much stronger case for state action than was present in *Moose Lodge* because, among other things, the SEC itself reviews and approves the rules of the exchanges, while in *Moose Lodge* the state liquor commission had no apparent involvement in the substance of the discriminatory by-law provision.

[11] *See also Public Utilities Comm. v. Pollak*, 343 U.S. 451, 462 (1952) (private transit company's policy of playing music through bus loudspeakers constitutes state action because the policy was reviewed and approved by government officials). Although state action was not found in *Blum v. Yaretsky*, 457 U.S. 991, that was because the challenged decisions were made by private doctors pursuant to their independent exercise of professional judgment, free from government influence. *See, e.g.*, 457 U.S. at 1006 ("the physicians, and not the forms, make the decision about whether patient's care is medically necessary. A physician can authorize a patient's admission to a nursing facility despite a 'low' score on the form"); *id.* at 1006 n.16 (the physicians "render medical judgments concerning the patient's health needs that the State does not prescribe and for which it is not responsible").

went well beyond compelling the exchanges to enforce their registration and mandatory arbitration rules against Ms. Duffield, because the federal government was actively involved in formulating those mandatory arbitration rules and has for many years closely overseen their implementation.

The SEC exercises plenary control over the scope and content of every arbitration rule that the exchanges propose to adopt. Nowhere is this power illustrated more clearly than in the SEC's recent approval, after six months of consideration, of the NASD's proposal to abandon mandatory arbitration of employment discrimination claims. *See supra* at 10 n.6. The NASD's proposed rule change could not have taken effect until the SEC reviewed and approved it, established its effective date (which was earlier than the NASD originally had proposed), and determined that it would apply to NASD arbitration only (although SEC unquestionably had statutory authority to extend the rule change to all registered exchanges, and to provide for an earlier effective date). *See* 15 U.S.C. § 78s(c); *see also* § 78s(g)(2) (authorizing SEC to "relieve any self-regulatory organization of any responsibility . . . to enforce compliance with any . . . rules or regulations . . . by any member of such organization or person associated with such a member").

The SEC has repeatedly exercised its oversight authority with respect to the exchanges' mandatory employment arbitration rules, just as it did with respect to the NASD's recent rule change and with the securities industry's Form U-4. Many of those rules, including several that are at the heart of Ms. Duffield's due process challenge to the adequacy of mandatory securities industry arbitration, were initially proposed by the SEC itself. *See supra* at 5; *cf. InterContinental Indus., Inc. v. Amer. Stock Exchange*, 452 F.2d 935, 941 & n.9 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (SEC's control over NYSE rulemaking subjects those rules to due process review). Moreover, the SEC staff has also conducted a

longstanding dialogue with the exchanges about those arbitration rules and procedures, resulting in a consensus between industry and the SEC (but not Ms. Duffield or other plaintiffs) concerning what modifications would be submitted for SEC approval. *See supra* at 5-6. These facts make this a far stronger "state action" case than *Blount* or *R.J. O'Brien*, because nothing in those cases suggests that the government was actively involved with the *substance* of the rules being enforced.[12]

The Ninth Circuit unduly minimized the federal government's involvement in the exchanges' mandatory arbitration rules and procedures by considering each strand of government involvement separately, rather than evaluating them as part a cohesive, interdependent whole. *See* Pet. App. 53a. Under the comprehensive federal scheme, Ms. Duffield could not be lawfully employed in her chosen profession as a securities trader without agreeing to arbitrate her claims under rules and procedures that a federal agency had been active in formulating, that it had formally approved, and over which it exercised continuing oversight review. Federal law also prohibited the exchanges from modifying those rules and procedures without the federal agency's approval, while that agency had unilateral power to change those rules at any time. The resutling scheme is thus "fairly attributable" to the state within the meaning of this Court's state action authorities. *See, e.g., Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982) and cases cited *supra* at 16 & n.11.

d. The Ninth Circuit also seriously misapplied the unconstitutional conditions doctrine by focusing exclusively

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[12] These facts also distinguish this case from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), in which a state agency merely did not act to disapprove a tariff filed by a utility company. There was no evidence in *Jackson* that the agency was aware of the provision of the tariff being challenged, much less that the agency had any role in formulating, or even consulting with, the utility company about that provision. We also note that *Jackson* involved a business corporation, not a regulatory organization deputized by the federal government to help police the securities industry.

on 1988—when Ms. Duffield initially signed her Form U-4—as the only relevant date for evaluating the federal government's involvement. Under the unconstitutional conditions doctrine, the pertinent inquiry should have been whether a government-mandated condition was imposed as a prerequisite for Ms. Duffield's continuing employment at *any* relevant time—not just on the date of her initial hiring. Even if "state action" did not arise until the promulgation of 17 C.F.R. § 240.15b7-1 in 1993, it should have been found in this case, because that regulation required Ms. Duffield to be registered with an exchange (and therefore to accept mandatory arbitration of any employment claims that arose) when *each* of the events occurred that gave rise to her claims on the merits.

Ms. Duffield could not have withdrawn her registration while continuing to be employed, unless the SEC first changed its registration regulation. Nor could Robertson Stephens have withdrawn from membership in an exchange and remained in business, absent a change in federal law. Nor could the NASD or NYSE have modified their Form U-4 arbitration rules and procedures absent SEC approval. Thus, even if the 1993 regulation were the determinative factor in the "state action" inquiry, after 1993 that federal regulation unquestionably imposed an unwaivable condition upon Ms. Duffield's continued employment. Ms. Duffield may have been free to negotiate higher wages or better benefits as the *quid pro quo* for continuing to work. But because of federal law, registration with an exchange (and therefore mandatory arbitration) constituted a non-negotiable condition of employment if Ms. Duffield wished to continue working in her chosen profession for any securities firm doing business in the United States. She was therefore forced, before and *after* 17 C.F.R. § 240.15b7-1 took effect in 1993, to choose between her continued employment and her constitutional rights.

3. Once the "state action" threshold is crossed, it necessarily follows that the securities industry's mandatory arbitration rules imposed an unconstitutional, and there-

fore unenforceable, condition of employment on Ms. Duffield by depriving her of constitutional rights.

a. Article III of the Constitution vests the "judicial Power of the United States" in courts whose judges have lifetime tenure and salary protection. Under this Court's precedents, the federal government may not consign parties to the jurisdiction of a non-Article III forum to resolve essentially private, state-law claims, at least not without the parties' consent. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848-50 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985) ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action, without *consent* of the parties. . . ." (emphasis supplied)); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

Under the unconstitutional conditions doctrine, Ms. Duffield cannot be said to have "consented" to have her statutory and common law claims relegated to the securities industry arbitration forum because her "agreement" was compelled by federal authority and imposed as a non-negotiable condition of her employment. This case is therefore unlike *CFTC v. Schor*, where plaintiffs were deemed to have consented to have a non-Article III tribunal hear counterclaims against them because they submitted their affirmative claims to the same non-Article III tribunal. Ms. Duffield filed all *her* claims in court and she strenuously argued from the outset that she should be permitted to litigate those claims in court.

b. The Seventh Amendment precludes the federal government from depriving litigrants of the right a trial by jury on claims that "involve[] rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Ms. Duffield's state common law tort and contract claims unquestionably "involve[] rights and remedies of [that] sort." While the

right to a jury may be waivable, the only arguable "waiver" by Ms. Duffield is the Form U-4 she was forced to sign as a non-negotiable, federally-mandated condition of employment, and her Complaint against Robertson Stephens contains an express demand for a jury trial. Again, the unconstitutional conditions doctrine requires the conclusion that the imposition of such a mandatory surrender of a constitutional right is not a voluntary waiver but an unconstitutional condition that that impermissibly compromises Seventh Amendment rights.

c. With respect to the Fifth Amendment right to due process, mandatory securities industry arbitration denies Ms. Duffield the right, enjoyed by workers in all other industries, to have her claims decided by a tribunal that is required to apply pertinent statutes and case precedents. Ms. Duffield's Brief in Opposition summarizes the undisputed record evidence demonstrating, *inter alia*: that securities industry arbitrators are expressly instructed that they may ignore the law in favor of their own sense of "fairness"; that they do in fact ignore the law, such as by denying attorney's fees to prevailing plaintiffs who have a statutory entitlement to them and by imposing steep "forum fees" of tens of thousands of dollars upon litigants, including prevailing plaintiffs; that empirical studies show that securities industry arbitrators are more likely than courts to rule for employers on employment claims and to award lower damages when a plaintiff does prevail; and that securities industry arbitrators are instructed not to provide reasoning for their decisions (and do not, in fact, provide reasoning in their largely staff-written arbitration awards) so as to make meaningful judicial review of the substance of their decisions impossible. That record establishes a violation of plaintiff's fundamental due process rights. The ultimate due process right is the right to have one's claim resolved in accordance with the governing law. Although a plaintiff may voluntarily agree to have a statutory dispute resolved under inadequate procedures, the government cannot *compel* a plaintiff to submit to such procedures as a con-

dition of obtaining, or retaining, employment in her chosen profession.

CONCLUSION

For the foregoing reasons, if the Court grants Robertson Stephens' petition for a writ of certiorari, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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